Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

92-1141

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT S. HURD,
PETITIONER,

v.

ELIZABETH ANN HURD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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I

QUESTION PRESENTED

Does Massachusetts General Law Chapter 208, § 34 unconstitutionally deprive a divorced spouse of inherited property without due process of law and thus present this Court with a substantial federal question?

II

PARTIES BELOW

The parties below are Robert S. Hurd, the defendant-petitioner, and Elizabeth Ann Hurd, the plaintiff-respondent.

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OPINION BELOW

The Memorandum and Order of the Massachusetts Appeals Court is reported at 32 Mass. App. Ct. 1122, 595 N.E.2d 811 (1992) and appears in the Appendix hereto at A-34.

The Order of the Massachusetts Supreme Judicial Court denying Further Appellate Review is reported at 413 Mass. 1107, 600 N.E.2d 1000 (1992) and is reprinted in the Appendix hereto at A-36.

JURISDICTION

The Order of the Massachusetts Supreme Judicial Court was entered on October 1, 1992. This Petition was filed on or before December 31, 1992. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257.

CONSTITUTIONAL PROVISION & STATUTE INVOLVED

United States Constitution, Amendment Fourteen, Section 1:

> "... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts General Laws, c. 208 § 34

Alimony or assignment of estate; determination of amount; health insurance

Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and

the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

Amended by St.1988, c. 23, § 67; St.1989, c. 287, § 59; St.1989, c. 559; St.1990, c. 467.

STATEMENT OF THE CASE

The Petitioner, Robert S. Hurd, and the Respondent, Elizabeth Ann Hurd, had been married for over twenty-five (25) years when Mrs. Hurd filed a Complaint for Divorce in the Barnstable Division of the Probate & Family Court Department of the Commonwealth of Massachusetts on September 24, 1988, on the grounds of an irretrievable breakdown of the marriage. (A. 1) Mr. Hurd filed a Motion to File His Answer Late, which was allowed, and then filed his Answer to the Complaint for Divorce.

A divorce trial on the merits was held before Lewis, J. sitting in Barnstable Probate & Family Court on February 13, 26, and 27, 1990 and May 7 and 8, 1990.

Judge Lewis entered a Judgment of Divorce Nisi (A. 2-5) and Findings of Fact on October 31, 1990. (A. 6-26) Included within the Judgment of Divorce Nisi was the assignment to the Wife of one-half the principal ($543,170) of The Robert S. Hurd Trust. (A. 3)

The Husband filed his Notice of Appeal from the Judgment of Divorce Nisi on November 9, 1990.

Post-judgment motions seeking to alter and amend the judgment were denied except as to minor clarification.

On June 29, 1992, the Appeals Court of the Commonwealth of Massachusetts denied the Husband's appeal from judgment of the Barnstable County Probate & Family Court. Justices Smith, Jacobs and Ireland, JJ., stated "that the trial judge could properly consider the property received by the husband through inheritance under G.L. c. 208, § 34." (A. 27-29).

On August 13, 1992, the Husband applied to the Supreme Judicial Court of the Commonwealth of Massachusetts for a Leave to Obtain Further Appellate Review.

On October 1, 1992, the Husband's Application for Further Appellate Review to the Supreme Judicial Court of the Commonwealth of Massachusetts was denied. (A. 30)

STATEMENT OF THE FACTS

The Petitioner seeks to have the inheritance factor of Massachusetts General Laws c. 208, § 34 (hereinafter "M.G.L. c. 208, § 34") declared unconstitutional as applied to him in that he has suffered an unconstitutional deprivation of property without due process of law.

The Petitioner (hereinafter "Robert Hurd") and the Respondent (hereinafter "Ann Hurd") were married in Weston, Massachusetts on June 30, 1962 and last lived together in Falmouth, Massachusetts in June, 1988. Together they raised four (4) sons, three of whom are emancipated and the youngest, Peter, is age 17 and in a boarding prep school.

For the first 20 years, the parties had a very traditional marriage. Robert Hurd was employed outside the home while Ann Hurd was a homemaker. Robert Hurd was employed for over 17 years with the Bank of Boston and rose to an annual salary of approximately $30,000 by 1982. What makes this case unusual is that Robert Hurd's earned income was supplemented, and at times, doubled, by the income stream generated by his inheritance from his grandmother, Louella Studley, who died in 1964, and his mother, Eleanor Studley Hurd, who died in 1965.

As a result of the income Robert Hurd received from his inheritance, the parties were able to enjoy more of an upper middle class station in life than Robert Hurd's salary alone would have allowed. The parties purchased their first home in Wayland, Massachusetts in 1965 for $33,000 in cash. The cash for the purchase of the home came exclusively from Robert Hurd's inheritance from his grandmother.

By 1965, Robert Hurd had accumulated approximately $60,000 in a mutual fund from his grandmother through

annual gifts beginning when Robert Hurd was a child. Robert Hurd also received approximately $50,000 through his grandmother's Will in 1965. In addition, Robert Hurd became a beneficiary of his grandmother's Trust, The Louella Studley Trust, from which he received three lump distributions on his 30th, 35th, and 40th birthdays. Before Robert Hurd's grandmother died in 1964, she gave to Robert Hurd, his sister, and his mother as joint tenants a summer home at 66 Spinnaker Lane, Falmouth, Massachusetts.

Robert Hurd's mother died in late 1965, and through inheritance from her, Robert Hurd's estate increased. Robert Hurd and his sister each acquired half of their mother's interest in the Falmouth summer home. Robert Hurd subsequently purchased his sister's interest in the home and became the sole owner in 1967.

In 1967, Robert Hurd began receiving income from two separate trusts both of which were called the Eleanor Studley Hurd Trust. One of these trusts was created in 1938. With regard to this Trust, Robert Hurd received lump sum distributions of principal on various birthdays, with the distributions ceasing when he reached the age of 45. The second trust was created in 1940. With regard to this trust, Robert Hurd has never received any principal from that Trust, but has received half of the yearly income of the Trust since his mother's death.

As a result of his inheritances, Robert Hurd created The Robert S. Hurd Trust on May 2, 1967. Robert Hurd as the Donor, retained exclusive control and exclusive rights to amend or revoke this Trust at any time during his lifetime. The Robert S. Hurd Trust was funded only by property inherited by Robert Hurd i.e.: (securities and cash).

It is important to note that at the time of the creation of The Robert S. Hurd Trust, May 2, 1967, Massachusetts had

not yet amended M.G.L. c. 208, § 34 to include inherited property as part of the marital estate which may be divided upon divorce. M.G.L. c. 208, § 34 was amended on July 19, 1974 to include inherited property as property subject to equitable distribution upon a judgment of divorce.

As a result of Robert Hurd's inheritances, the parties acquired several pieces of real estate in addition to Robert Hurd's summer home in Falmouth. During the 1970's, the parties were able to use Robert Hurd's inheritance to move to a larger home in Wayland, Massachusetts and acquire real estate in Boxborough, Massachusetts as an investment.

In 1981, Robert Hurd lost his job at the Bank of Boston. Fortunately, Robert Hurd was able to join an affiliate of the bank in Falmouth, and the parties decided to move to the summer home in Falmouth. The parties moved to Falmouth in early 1980 and Robert Hurd began his new job. Robert Hurd is currently a self-employed mortgage originator.

It was in the summer of 1987, that the parties' disagreements inceased and the marriage began to break down. The parties had a contested divorce trial and a Judgment entered on October 31, 1990 providing for support payments and a division of marital assets.

Robert Hurd is appealing the trial judge's findings concerning the assignment of half the principal of The Robert S. Hurd Trust to Ann Hurd. It is Robert Hurd's position that the inheritance factor of M.G.L. c. 208, § 34, as applied by the trial judge, unconstitutionally deprived him of his property interest in his inherited property without due process of law, as guaranteed by the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

I. By Distributing Approximately One-Half Of The Robert S. Hurd Trust To The Plaintiff-Respondent, Massachusetts, Through Enactment Of Massachusetts General Law, Chapter 208, § 34 As Applied By The Probate And Family Court Trial Judge, Has Unconstitutionally Deprived The Defendant-Petitioner Of An Inherited Property Interest Without Due Process Of Law And Thus Presents This Court With A Substantial Federal Question

A. *The U.S. Supreme Court Has Jurisdiction Over Property Division in State Divorce Cases That Involve a Substantial Federal Question*

Pursuant to 28 U.S.C.A. § 1331, the Petitioner's claim presents to this Court a federal question[1] regarding the reach of the protection provided by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This Court has recognized the constitutionally protected right of a divorced spouse to be afforded due process of law in the distribution of property following a judgment of divorce. *Mansell* v. *Mansell,* 490 U.S. 581 (1989).[2]

The distribution of the Petitioner's inherited trust property (The Robert S. Hurd Trust) by the Probate and Family Court pursuant to M.G.L. c. 208, § 34 draws the constitutional validity of the inheritance factor of the statute into

[1] Cases arising under Constitution of the United States, Acts of Congress, or treaties, and involving their interpretation and application, and of which jurisdiction is given to federal courts, are commonly described as involving a "federal question." 28 U.S.C.A. § 1331.

[2] See also *Ridgeway* v. *Ridgeway*, 454 U.S. 46 (1981); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979).

question and thus presents to this Court a substantial federal question.[3]

By applying M.G.L. c. 208, § 34 to distribute property to the Petitioner's Wife which the Petitioner inherited, the trial court deprived the Petitioner of a property interest without due process of law. Extending M.G.L. c. 208, § 34 to allow

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[3] On July 19, 1974, the Massachusetts Legislature enacted Mass. Gen. L. ch. 208, § 34. The statute, as amended, provides that "the court may assign to either husband or wife all or any part of the estate of the other." The Massachusetts Supreme Judicial Court has made clear that "estate" shall be interpreted to mean any and all property however and whenever acquired by either spouse including property acquired by gift or inheritance. See *Rice* v. *Rice*, 372 Mass. 398 (1977); *Bacon* v. *Bacon*, 26 Mass. App. Ct. 117 (1988); *Bak* v. *Bak*, 24 Mass. App. Ct. 608 (1987).

Prior to its enactment on July 19, 1974, Mass. Gen. L. ch. 208, § 34 read as follows: "Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband." Section 34, as amended, now lists specific relevant factors in alimony awards and property assignments:

In abbreviated form, M.G.L. c. 208, § 34, as amended, presently considers the following sixteen (16) factors in determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned.

(1) The length of the marriage;
(2) the conduct of the parties during the marriage;
(3) the age of the parties;
(4) the health of the parties;
(5) the station of the parties;
(6) the occupation of the parties;
(7) the amount of income of the parties;
(8) the sources of income of the parties;
(9) the vocational skills of the parties;
(10) the employability of the parties;
(11) the estate of the parties;
(12) the liabilities of the parties;
(13) the needs of the parties;
(14) the opportunity of each of the parties for future acquisition of capital, assets and income;
(15) the contribution of each of the parties in the acquisition, preservation and appreciation in value of their respective estates; and
(16) the contribution of each of the parties as a homemaker to the family unit.

judges to assign inherited property upon divorce to the spouse who did not inherit it is repugnant to the Fourteenth Amendment to the Constitition and thus presents to this Court a substantial federal question.

It is well settled that state family and family-property law must do "major damage" to clear and "substantial" federal interests before this Court will seek to overturn state law. *United States* v. *Yazell*, 382 U.S. 341 (1966); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979); *Rose* v. *Rose*, 481 U.S. 619 (1987). However, this Court has also stated that such state regulation must be in conformity with due process. *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980).

> "The relation of husband and wife is . . . formed subject to the power of the state to control and regulate both that relation and the property rights directly connected with it; by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference." *Executors* v. *Kilgore*, 145 U.S. 487, 491 (1892).

The term "property" as used in an analysis of due process, is broadly interpreted. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 571 (1972); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith, Clerk of the Circuit Court of Seminole County*, 449 U.S. 155 (1980). Clearly, the Petitioner's interest in The Robert S. Hurd Trust at the time of the Judgment of Divorce Nisi rises to the level of a property interest and is therefore protected under due process guarantees including the right not only to title and possession, but also the rights to acquisition and control. 16C C.J.S. *Constitutional Law*, §983 (1985).

Petitioner's interest in The Robert S. Hurd Trust at the time of the Judgment of Divorce Nisi was $1,086,343 (A-6). The Trust represented the Petitioner's most significant asset and any significant taking of property by a State is within the purview of the Due Process Clause of the Fourteenth Amendment. *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

Accordingly, this case presents an important question of whether the Due Process Clause affords any protection to a spouse whose inherited property is distributed to his or her spouse in a Divorce Judgment pursuant to a state statute that permits a trial judge to distribute inherited property.

B. *The Due Process Clause of The Fourteenth Amendment is Violated When a State Has Enacted a Statute or Rendered a Judgment That is Unreasonable, Arbitrary, or Capricious and is Not Rationally Related to a Substantial State Interest*

The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relation to the objective sought to be attained. *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85 (1980) (quoting *Nebbia* v. *New York*, 291 U.S. 502 (1934)). Furthermore, this Court has stated that no analysis of a due process violation shall take place unless the deprivation suffered by the Petitioner resulted from state action. *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978).

The deprivation of inherited property suffered by the Petitioner was as a result of a state statute applied by the trial judge. This Court has stated that private use of state-sanctioned private remedies or procedures does not rise to the level of state action. *Tulsa Professional Collection Services, Inc.* v. *Pope, Executrix of the Estate of Pope*, 485 U.S. 478

(1987). However, when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

Massachusetts, through the enactment of M.G.L. c. 208, § 34 and pursuant to a state court's Judgment of Divorce, has acted in such a manner as to deprive the Petitioner of his inherited property. Indeed, the Petitioner's situation is as deserving of protection as the petitioner in *Lugar*. This Court, in *Lugar* reasoned that a statutory scheme is obviously the product of state action, and a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" and to characterize the taking as a result of state action. *Id.* at 942. The Petitioner thus presents to this Court a taking of his inherited property through state action.

The trial courts application of M.G.L. c. 208, § 34 as it affected the Petitioner's inherited property resulted in an unreasonable, arbitrary and capricious state action that lacked any rational relationship to the state's interest in effectuating the equitable distribution of marital property. Massachusetts, along with thirty-six other states, is an equitable distribution state. Of these thirty-seven states, Massachusetts is one of fourteen states with "pure" equitable distribution.[4] That is, the trial judge by way of the sixteen factors included in M.G.L. c. 208, § 34 is given broad discretionary power to "distribute" the assets of either spouse. The broad power of the courts to assign property constitutes state action with

[4] See, Interim Report on Domestic Relations Law in Massachusetts, House of Representatives, 1986; See also, Goldberg, Valuation of Divorce Assets Ch. 1, § 1.4, 1989.

the inherent potential of depriving the parties of significant property interests.[5]

The family law reform of the 1960's and 1970's that resulted in "pure" equitable distribution was based on the ideal of perfect individualized justice. Unfortunately, the cost of this dream has proven too high. Having sixteen factors is analogous to having no factors because there is no conformity of application by judges, no balancing test and no control. This arbitrary application of the statute is especially acute in the area of inherited property. Twenty states plus the District of Columbia exclude inherited property from the marital estate to be divided.[6] The arbitrariness of the inheritance factor of M.G.L. c. 208, § 34 affects what is normally both financially significant property and, as in the present case, property with significant sentimental value passed down through generations. The Petitioner acquired the corpus of The Robert S. Hurd Trust through gifts and inheritance from both his mother and grandmother. The arbitrary taking of this inherited property by the trial court judge pursuant to M.G.L. c. 208, § 34 was an unconstitutional deprivation of property that had no relation to any substantial state interest.

C. *The State Statute Applied by The Trial Court Which Resulted in an Unconstitutional Deprivation of Property is Analogous to The Tax Statutes Previously Ruled Violative of The Due Process Clause Which Retroactively Attempt to Take Previously Bequeathed, Devised or Gifted Property*

Unlike any other domestic relations case this Court has considered involving property division, the property in issue here was given to the Petitioner prior to the amendment of M.G.L.

[5] See Inker and Clower, Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis, 16 Suffolk U.L. Rev. 907 (1982).

[6] See footnote 4.

c. 208, § 34. The amendment of M.G.L. c. 208, § 34 that gave Massachusetts trial court judges broad discretion to assign inherited property to either spouse took effect on July 19, 1974. The Robert S. Hurd Trust was created on May 2, 1967. The principal of The Robert S. Hurd Trust was funded by property (securities) that were inherited by the Petitioner from his mother and grandmother. Therefore, at the time that The Robert S. Hurd Trust was created with inherited property, the Petitioner did not contemplate the possibility of the Respondent eventually obtaining any portion of the trust principal because the statute providing for such a possibility did not then exist.[7]

The taking is therefore analogous to those cases considered by this Court whereby tax statutes that have a retroactive effect upon previously bequeathed, devised, or gifted property have been ruled violative of the Due Process Clause of the Fourteenth Amendment. *Nichols* v. *Coolidge*, 274 U.S. 531 (1927).[8]

It is well settled that a retroactive application of a tax statute is violative of the Fifth and Fourteenth Amendments to the Constitution if their application is unduly harsh, oppressive, arbitrary or capricious. *Carlton* v. *United States*, 972 F.2d 1051, 1059 (9th Cir. 1992); *Cappuccilli* v. *Commissioner of Internal Revenue*, 668 F.2d 138, 142 (2nd Cir. 1981). The tax statute is unduly harsh if a) the taxpayer did not have actual or constructive notice that the tax statute would be retroactively amended, and b) the taxpayer relied to his detriment on the pre-amendment tax statute, and such reliance was reasonable. *Carlton*, at 1059.

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[7] See footnote 3.

[8] See also *Heiner, Collector of Internal Revenue* v. *Donnan*, 285 U.S. 312 (1931); *Helvering, Commissioner of Internal Revenue* v. *Helmholtz*, 296 U.S. 93 (1935).

Applying the present case by analogy to the retroactive tax standard in *Carlton*, it is clear that the Petitioner's property interest in The Robert S. Hurd Trust through the retroactive application of M.G.L. c. 208, § 34 forced an involuntary divestment of property without due process. It is undisputed that the Petitioner had no notice of the 1974 amendment to M.G.L. c. 208, § 34. Nor is there any basis upon which the Petitioner could have had constructive notice of the future amendment of M.G.L. c. 208, § 34. The Petitioner concedes that he voluntarily entered into the marital relationship and that such a step necessarily affects ownership in property acquired thereafter. However, deprivation of ownership rights in previously acquired or inherited property through the enactment and retroactive application of an unduly harsh and arbitrary state statute is not a necessary or reasonable risk that the Petitioner should have been expected to endure.

Given the harsh results ultimately imposed upon the Petitioner due to the retroactive taking of half the principal of The Robert S. Hurd Trust, this Court should resolve this matter so as to protect the guarantees afforded the Petitioner by the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

The Petitioner has raised important questions regarding the Due Process Clause and its application to inherited property assigned pursuant to a Divorce Judgment. To the extent that the Petitioner's property was distributed by application of a statute that was nonexistent at the time of the vesting of the property, this case raises important Fourteenth Amendment issues that this Court should resolve.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

PROBATE COURT
No. _____

BARNSTABLE, ss.

ELIZABETH ANN HURD,
PLAINTIFF,
v.
ROBERT S. HURD,
DEFENDANT

COMPLAINT FOR DIVORCE

1) Plaintiff, who resides at 66 Spinnaker Lane, Falmouth, MA was lawfully married to the defendant, who now resides at 72 Riddle Hill Road, Falmouth, MA.

2) The parties were married at Weston, MA on June 30, 1962 and last lived together at 66 Spinnaker Lane, Falmouth, MA on June 25, 1988.

3) The minor child Peter S. Hurd (there are three adult children also) of this marriage, and date of birth is May 23, 1975.

4) Plaintiff certifies that no previous action for divorce, annulling or affirming marriage, separate support, desertion, living apart for justifiable cause, or custody of child has been brought by either party against the other. No exceptions.

5) On or about June 25, 1988 and for a long period of time prior thereto there has existed an irretrievable breakdown of the marriage.

6) Wherefore, plaintiff demands that the court:

- ☐ waive the 30 day requirement for filing this complaint
- ☒ grant a divorce for irretrievable breakdown of the marriage pursuant to MGL C 208, §1B
- ☒ prohibit defendant from imposing any restraint on plaintiff's personal liberty
- ☒ grant them joint custody of the above-named child.
- ☒ order a suitable amount for support of the plaintiff and said minor child.
- ☐ order conveyance of the real estate located at ____ _____ standing in the name of _____ _____ as recorded with _____ Registry of Deeds, Bk. _____ Pg. _____
- ☐ allow plaintiff to resume her former name of
- ☒ order an equitable division of assets pursuant to MGL G 208, §34

Dated: Sept. 24, 1988

Signature of Attorney _____

Print name & address:
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CJ 101 12/76

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT
DOCKET NO. 88D-0774-D1

BARNSTABLE DIVISION

JUDGMENT OF DIVORCE NISI

ELIZABETH ANN HURD,
PLAINTIFF,
v.
ROBERT S. HURD,
DEFENDANT

All persons interested in having been notified in accordance with the law and findings having been duly rendered and attached hereto and after hearing it is adjudged nisi that a divorce from the bond of matrimony be granted the said plaintiff for the cause of IRRETRIEVABLE BREAKDOWN, M.G.L. Ch. 208, sec. 1B as provided by Chapter 208, sections 1, 2 and that upon and after the expiration of ninety days from the entry of this judgment it shall become and be absolute unless, upon the application of any person within such period, the Court shall otherwise order, and it is further ordered that

1. The parties shall have shared legal custody of Peter, who shall reside primarily with the Wife who shall have physical custody. The Husband shall have the right to visitation upon reasonable notice to the Wife.

2. Commencing on the first day of the month following this judgment, the Husband shall pay the Wife the sum of Five

Hundred ($500.00) Dollars per month for the support and maintenance of the minor dependent child Peter if he is attending boarding school and Twelve Hundred ($1,200.00) Dollars if he is not attending boarding school. The Husband shall pay the Wife Two Hundred ($200.00) Dollars per month for the support and maintenance of the dependent child Alexander ("Sandy") until he graduates from college. When Peter enters college, the child support payments for him shall be Two Hundred ($200.00) Dollars per month, as long as he is in college. These payments shall be subject to annual cost of living increases based on the percentage increase in the Boston Consumer Price Index and All Urban Consumers Index.

3. The Husband shall pay the cost (including tuition, board and room, laboratory and testing fees, admission and application fees, books and transportation costs actually incurred by or on behalf of a child going to or from home to school and such other items as normally are incurred as school expenses) of sending Alexander through the balance of college and of sending Peter to boarding school and college or its reasonable equivalent.

4. The Husband shall be entitled to claim Alexander and Peter as dependency exemptions so long as he is in compliance with this order and the Wife shall execute Federal Form 8332 when requested to do so.

5. Within thirty (30) days of entry of this Judgment of Divorce, in recognition of her contribution to the marriage and in lieu of all claims for alimony past, present and future, the Husband shall pay or transfer to the Wife the following:

a. Cash or certificates of deposit in the amount of $400,000.00;

b. The securities at the Shawmut Bank in the approximate amount of $130,588.00;

c. The Wife shall receive Five Hundred Forty-three Thousand One Hundred and Seventy ($543,170) Dollars from the Robert S. Hurd Trust;

With the further provision that the Husband shall pay to the Wife the sum of Two Thousand One Hundred Eighty-four ($2,184.00) Dollars per month as undifferentiated alimony and child support until the Husband transfers to the Wife funds enumerated in paragraphs 5A, 5B and 5C of this judgment nisi.

d. The Sunfish (boat) listed on the Husband's financial statement.

6. The Husband or his estate shall also pay to the Wife or her estate the sum of Three Hundred Seventy-five Thousand ($375,000.00) Dollars, payable in three installments of One Hundred Twenty-five Thousand ($125,000.00) Dollars on the first, second and third anniversary dates of the entry of this Judgment. These payments shall not be construed as alimony and therefore, shall not be taxable to the Wife or deductible to the Husband. This obligation of the Husband shall be secured by the Wife by a mortgage on the marital home at 66 Spinnaker Lane, Falmouth, Massachusetts.

7. Simultaneous with the payment of the funds to be paid to the Wife as enumerated in paragraph five (5) of this Judgment, the Husband shall cancel the promissory note from the Wife dated December 30, 1981, release the Wife from any and all interest due on the note and she shall forthwith transfer by quitclaim deed to the Husband all of her right, title and interest in and to the marital home located at 66 Spinnaker Lane, Falmouth, Massachusetts, with a value of One Million Two Hundred Thousand ($1,200,000.00) Dollars less a mortgage of approximately Eighty-nine Thousand ($89,000.00) Dollars.

The Husband shall assume and pay the outstanding mortgage on the marital home in the approximate amount of Eighty-nine Thousand ($89,000.00) Dollars and shall save the Wife harmless from any liability thereon.

The Wife shall record a mortgage on said Spinnaker Lane, Falmouth, property to secure the obligation to the Wife as set forth in paragraph six (6) of this judgment.

8. The 1981 "Option Agreement" between the Husband and Wife shall be and is hereby null and void.

9. The Wife shall vacate the marital home within sixty (60) days of the transfer by her of 66 Spinnaker Lane, Falmouth, to the Husband.

10. The Husband in addition to the transfer of the marital home to him, shall own as his sole property all the real property referred to as the Child's River Road properties, including Unit 7, 15 Child's River Road, Waquoit, Massachusetts, having a value of Two Hundred Twenty-five Thousand ($225,000.00) Dollars upon which there is no mortgage.

He shall retain the funds from the sale of the Boathouse in the amount of Twenty Thousand ($20,000.00) Dollars on the Child's River Road property.

He shall retain all other property at Child's River Road, including the unit sold during the trial of this case, his one third interest in the Rivers Edge, Waquoit, Massachusetts, property, his interest in Lot #4, Joshua Lane, Falmouth, his interest in 64 Highland Avenue, Falmouth, and the Gerloff property, which is comprised of five remaining lots.

The Wife shall relinquish any interest in the above enumerated properties.

Further, the Husband shall retain as his sole property insurance, securities, bank accounts, certificates of deposit, his Fidelity account, all standing in his name, and three joint savings accounts, his right to 50 percent of the income and discretionary principal from the Eleanor Studley Hurd Trust and the Robert S. Hurd Trust.

11. The parties shall divide their tangible personal property equally. The Court retain jurisdiction over this case in the event the parties cannot agree to an equal division of the tangible personal property and it may be necessary to appoint a Master.

12. The Husband shall pay all uninsured medical and dental expenses for the dependent children, Alexander and Peter, until their graduation from college.

13. The Wife shall maintain the family plan medical insurance policy through her employment and the Husband shall pay to her the difference monthly between a single plan and a family plan. If the Husband can no longer remain on the Wife's medical plan without additional cost, he shall have the option of paying the additional premium and remaining on her plan. If he chooses to leave her medical plan, he shall continue to pay the difference between a single plan and a family plan to cover the two children, Alexander and Peter.

14. The Husband shall retain his retirement plans and/or benefits in his vested Bank of Boston Retirement Plan with an estimated value of $62,100.00 and his IRA valued at $27,343.00.

The Wife shall retain as her sole property her IRA valued at $23,606.00 and a T.I.A.A. valued at $19,863.00.

15. The Husband shall maintain life insurance with the Wife as beneficiary in the amount of Three Hundred Thousand ($300,000.00) Dollars for as long as he is obligated to provide child support and tuition payments for Alexander and Peter Hurd. He is to provide evidence yearly to the Wife of his payment of premiums on said life insurance coverage.

16. The personal property listed on the Wife's financial statement, excluding the marital home at 66 Spinnaker Lane and the joint bank accounts, shall remain the sole property of the Wife and the Husband shall release all his right, title and interest therein.

17. The Husband shall pay Sixty Thousand ($60,000.00) Dollars toward the Wife's legal fees to Choate, Hall & Stewart.

October 31, 1990

Shirley R. Lewis
Justice, Probate & Family Court

A true copy
Attest:
Fredric P. Claussen

Register

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

PROBATE AND FAMILY COURT
No. 88D-0774-D1

BARNSTABLE, SS.

ELIZABETH ANN HURD,
PLAINTIFF,
v.
ROBERT S. HURD,
DEFENDANT.

FINDINGS OF FACT

LENGTH OF THE MARRIAGE

The Plaintiff, hereinafter referred to as the Wife, and the Defendant, hereinafter referred to as the Husband, were married at Weston, Massachusetts, on June 30, 1962.

The parties last lived together on June 24, 1988. This was a long marriage of twenty-six (26) years at the time of the final separation and twenty-eight (28) years at the time of trial.

This was the first marriage for each of the parties.

AGE OF THE PARTIES & THEIR CHILDREN

The Wife is forty-nine (49) years old.
The Husband is fifty-one (51) years old.
There have been four children born of the marriage:

Robert S. Hurd, Jr., who is twenty-five (25) years old, is a graduate of the Middlesex School and Bowdoin College. He is emancipated and is a teacher at Tabor Academy.

John W. (Jack) Hurd, who is twenty-four (24) years old, a graduate of the Brooks School, the University of Vermont in 1988 and is working in Thailand.

Alexander (Sandy) Hurd is twenty (20) years old, a graduate of Falmouth High School and has completed his sophomore year at Colgate University.

Peter Hurd was born on May 23, 1975 and upon completion of the eighth grade, has enrolled at St. George's School in Rhode Island as a first year student.

The Wife resides at 66 Spinnaker Lane, Falmouth, Massachusetts.

The Husband resides at 15 Childs River Road, Unit 7, Waquoit, Massachusetts.

The parties last lived together at 66 Spinnaker Lane, Falmouth, Massachusetts on or about June 24, 1988.

HEALTH OF THE PARTIES

The parties are in excellent health.

STATION OF THE PARTIES

The parties have lived in an upper class life style. They have enjoyed all of the amenities and comforts that an upper class life style has made possible for them throughout the marriage as a result of a very substantial inheritance that the Husband received early in the marriage and continued to receive the benefits therefrom all during the marriage. This life style was further benefited financially by the Husband's employment as a banker in the earlier and middle years of the marriage and the Wife's employment after the children were old enough to permit her to obtain employment outside of the marital home, first with part-time employment at Wheaton College and later

in full-time employment at Wheaton College as its Fund Raiser and in Development for the College.

The parties were able to send their children to private schools and college, travelled extensively and lived in large and comfortable homes.

During their marriage, the Husband and Wife entertained friends and the Husband's business associates frequently. They took many vacations. They travelled to Europe, Hawaii, Bermuda, Belize and many other places each winter. They enjoyed skiing vacations to Vermont and New Hampshire. Their travels further took them on sailing vacations to the Caribbean and also to various parts of New England. The family members sailed in the summer and had four boats for their enjoyment.

Their first purchase of a home by the Husband and Wife was in 1965 in Wayland, Massachusetts, for $33,000.00. There was no mortgage on the property.

In 1971, they purchased a two acre parcel of land in a prestigious neighborhood on Decatur Lane, Wayland, Massachusetts. They built a large home containing five bedrooms, two and one-half baths, a living room, dining room, family room, breezeway, sewing room, playroom and five working fireplaces.

They decided to sell the Wayland home when the Husband obtained employment on Cape Cod and they spent approximately the last eight years of their marriage at their spacious waterfront home facing the ocean and located at 66 Spinnaker Lane, Falmouth, Massachusetts.

Prior to moving to the Falmouth home, the Husband and Wife and their children spent most of their summers at the Spinnaker Lane, Falmouth, home, which originally was owned by the Husband's grandmother. He inherited a one-third interest in this property from his grandmother, as did his sister and his mother.

Upon his mother's death in 1965, he and his sister inherited her interest. In 1967, the Husband purchased his sister's one-half interest for $22,000.00. The fair market value of the property at that time was $44,000.00.

In 1980, the parties sold Decatur Lane for approximately $195,000.00. The family moved into their summer home in Falmouth. The parties installed a heating system together with insulation. They renovated the bathrooms and bedrooms, added a new roof and mud room and landscaped the grounds. They fortified the sea wall. The Spinnaker Lane house has five bedrooms, four bathrooms, living room, dining room, kitchen, mud room, den, laundry room and enclosed porch. The property also has a detached two-car garage and an apartment with a present rental income of $144.00 per week. The house is located on the ocean at the end of a private dead end road. Since the parties' separation, the Wife has been collecting the rental income and using it toward living expenses.

The Spinnaker Lane, Falmouth, property now has a present value of One Million, Two Hundred Thousand ($1,200,000.00) Dollars less a mortgage of $89,614.00, leaving a value of One Million One Hundred Ten Thousand, Three Hundred Eighty-six ($1,220,386.00) Dollars.

OCCUPATION OF THE PARTIES

The Wife is a graduate of Wheaton College and has an M.A. degree in organic chemistry from Bryn Mawr College. The Wife is employed as the Director of Annual Giving at Wheaton College. She has worked at that position since 1987.

Until 1983, the Wife worked at home as a housewife and the primary caretaker of her children. In 1983, she began to work outside the home in a part-time position at Wheaton College as the coordinator of its sesquicentennial celebration.

This position became full-time in 1984. In 1985 though 1987, the Wife worked full-time for the New Seabury Corporation. In 1987, she took the position that she presently holds at Wheaton College.

The Husband is presently unemployed. Since 1986, he has worked intermittently on a commission basis as a mortgage broker with independent contractor status for First Federal Savings and then for Home Site Mortgage. The last time the Husband received commissions from Home Site Mortgage was in January, 1990. In 1989, his earned income totalled $5,000.00. He has been developing some real estate during the last few years.

During the marriage the Husband became a management trainee at the First National Bank of Boston and from 1965 to 1969 he was branch officer of the said bank at its Kenmore Square office.

For the next two years he was Loan Officer for the bank at its 50 State Street, Boston, office.

From 1971 to 1979 he served as Vice President of the bank. During the next two years he was the Vice President of the Old Colony Bank, Falmouth, Massachusetts. He spent the next three years as Vice President of the Fall River branch of the Bank of New England. His banking career ended in 1985 and in 1986 he became an independent mortgage broker. During the past few years he has participated as a limited partner in the development of land for re-sale on Cape Cod and has not been otherwise employed.

VOCATIONAL SKILLS & EMPLOYABILITY OF THE PARTIES

The Wife is a graduate of Wheaton College. She received a master's degree in organic chemistry from Bryn Mawr in 1964. She has not worked in this field, however. Her skills are in the area of college fund raising — development and

annual giving — and she is employable in this field. She presently works full time in this field at Wheaton College.

The Husband received a bachelor's degree from Bowdoin College in 1961. He also has a professional degree from the Stonier Graduate School of Banking. He is a skilled banker with a wide variety of banking experience. Employment for someone with his skills and work experience is available, but he does not choose to be employed.

The Husband also has some limited experience in real estate development. Primarily, he has been involved in investing as a limited partner in real estate development projects.

ESTATE OF THE PARTIES

The Wife presently holds title to the marital home located at 66 Spinnaker Lane, Falmouth, Massachusetts. Title is in the name of the Woodcock Trust with Elizabeth Ann Hurd, the Wife, holding the entire beneficial interest.

The fair market value of this property I find is $1,200,000.00. There is an outstanding mortgage on the property in the amount of $89,614.00, leaving an equity of $1,110,386.00.

The Wife has other assets as follows:

Stocks	$ 16,669,00
Bank Accounts	9,027.00
Certificate of Deposit maturing 7/5/90	10,249.00
Mutual Funds	41,606.00
IRA Magellan	23,891.00
TIAA/CREF	19,863.00
Bank Account (Joint-½ as of 12/31/89)	1,120.00
Automobile-1988 Honda Accord (67,000 miles)	4,450.00
Wife's Total	$1,237,271.00

The Husband owes the following property with values as follows:

Robert S. Hurd Trust	$1,086,343.00
Real Estate	
Child's River Road	
Unit 7-on current market (an end unit with a greater value than Unit 4)	225,000.00
Unit 4 ($208,000) ½ interest	104,000.00
Boathouse ($27,000) He sold without permission of Court for	20,000.
64 Highland Ave., Falmouth (½ interest)	13,250.00
Lot 40 Joshua Lane, Falmouth (30% interest)	20,000.00
Gerloff property-5 lots	225,000.00
(His attorney testified there is no basis for a pending law suit versus the Husband regarding this property. Therefore, the Court does not accept the testimony as to value by the Husband of $25,000.00)	
Boats:	
Bristol 29.9	25,000.00
Herreshoff 12	7,500.00
Boston Whaler	7,500.00
Sunfish	100.00
Insurance	13,137.00
The Husband has a retirement plan with the Bank of Boston that will pay him $344.52 monthly beginning at age 55. No estimated value of the plan.	
The Husband also has an IRA Fidelity Magellan valued at	27,343.00
Odd Lot Holdings	1,500.00
Securities held at Shawmut National Bank	130,588.00
Cash:	
Shawmut National Bank	14,702.00
Baybank-½ interest	574.00

Plymouth-½ interest	290.00
Mutual Bank-½ interest	256.00
Certificates of Deposit	50,000.00
Fidelity Daily Income	11,696.00

Rights to 50% of income and discretionary rights to principal approved by the trustees of the Eleanor Studley Hurd Trust plus Trustee fees — Husband failed to list any income from said Trust.

The Husband's listed estate is approximately Two Million ($2,000.00.00) Dollars. This amount does not include any figures regarding the marital home or his income from the Eleanor Studley Hurd Trust, which will pay him income for life, or the value of his pension, nor rent from Mashpee property.

The total marital estate is in excess of Three Million Two Hundred Eighty-two Thousand, Two Hundred Seventy-one ($3,282,271.00) Dollars. It does not include monies the Husband receives from the Eleanor Studley Hurd Trust or rental money he receives from property in Mashpee in which he has an interest.

LIABILITIES OF THE PARTIES

The Wife has a debt (discussed elsewhere in these findings) on a mortgage on the marital home at 66 Spinnaker Lane, Falmouth, Massachusetts.

She has incurred counsel fees of approximately Seventy-seven Thousand Six Hundred Twenty-one ($77,621,00) Dollars. She has paid approximately $26,000.00 to her attorneys to date.

The Husband has liabilities regarding a $5,000.00 note to Shawmut Bank and legal fees in the amount of $17,500.00 to his current attorneys in this case.

He also lists as his liabilities, the mortgage on the marital home at 66 Spinnaker Lane, Falmouth, Massachusetts in the amount of approximately $90,000.00 and the mortgage on 64 Highland Avenue, Mashpee, Massachusetts, in which he has a 50 percent interest.

He lists legal expenses to defend a lawsuit filed against him and others for an alleged breach of contract on the Child's River property.

INCOME OF THE PARTIES

The Wife has a present income of Thirty-five Thousand Nine Hundred Thirty-two ($35,932.00) Dollars per year. She has about Six Thousand ($6,000.00) Dollars of interest and dividends from her investments.

She receives the rental income from an apartment which is rented and located on the property at 66 Spinnaker Lane, Falmouth, Massachusetts, in the amount of $144.00 per week which she has used to contribute to the mortgage and expenses for running the marital home at 66 Spinnaker Lane, Falmouth, Massachusetts.

She receives unallocated alimony and child support of Two Thousand One Hundred Eighty-four ($2,184.00) Dollars per month from the Husband as per court order of McGovern, J. on November 8, 1988.

The Husband has a present income as follows:

a. Trust income and trustee fees

b. Dividends and interest

c. Income and capital gains listed on his current financial statement.

The Husband's gross income for 1989 was $54,536.00. Adding to this figure, he received $48,458.00 in capital gains for a total of $102,994.00.

The Husband is an experienced banker with additional experience in mortgage origination and placement. He has chosen not to pursue these lines of endeavor and has limited

the past few years to investment in real estate with his girlfriend and other investors as well as depleting his funds.

NEEDS OF THE PARTIES

The Wife is presently living in the marital home at 66 Spinnaker Lane. If she moves from the marital home, she will need a residence of her own with sufficient and adequate bedrooms for the four children and their families to visit from time to time. Two of the four children still reside with the Wife; hence, she needs a minimum of four bedrooms to permit the older two children to visit on occasion.

The Wife's weekly expenses individually, and as the primary custodial parent of the unemancipated children, total $1,228.00.

She needs sufficient assets from an equitable division of marital property plus her earned and unearned income to provide for her support and also some support for the two children who are still attending college and private school respectively, and will be home from time to time during the next several years. She will need $500.00 per month for Peter if he remains at home and a like amount for Alexander.

Further, the Eleanor Studley Hurd Trust provides by amendment, use of funds from the Trust for any of her grandchildren. The trustees, in their uncontrolled discretion, may pay such sums as necessary or expedient for her grandchildren's comfort, support, maintenance or other needs, considering such other resources as may be available for that purpose.

The Husband has a substantial income as set forth on his current financial statement to provide for his own needs.

The Wife needs the funds ordered by this Court, McGovern, J., dated November 8, 1988, for payment by the Husband to the Wife as undesignated alimony and child support in the amount of $2,184.00 monthly until the Husband

makes the first payment of $400,000.00 to the Wife as set forth in the Judgment nisi, entered herewith.

CONDUCT OF THE PARTIES

The Wife has been supportive of the Husband and has acted responsibly and in a fashion recognized to be reasonable in a relationship between husband and wife. She has been primarily responsible for the care and nurture of the children. She was a warm and loving wife to the Husband during his employment as a bank officer, she entertained his business associates, hosted meetings on business trips with him, and in general, was warm and supportive of him in his work. She was involved in all decisions regarding the purchase, care and maintenance of the family homes.

In 1983, after her youngest child began school, the Wife went to work outside the home on a part-time basis for Wheaton College.

In 1984, the Wife became employed full time and has worked full time ever since.

For twenty-five years, the Husband was supportive of the Wife and acted responsibily and lovingly in a manner appropriate in a relationship between husband and wife.

In 1985, the Husband lost his employment and has not had regular employment since. For a time, he pursued a career as a mortgage broker, with independent contractor status, first with First Federal Savings and then with Home Site Mortgage. Since the divorce proceedings, he has not worked full time as a mortgage broker and has not produced substantial income from this career.

In October 1986, the Husband met another woman with whom he developed a physical and intimate relationship. He would visit with her at night when he had indicated that he was out "working" as a mortgage broker.

In November 1986, the Wife went to Nantucket with her mother. The Husband stayed at home to care for the children.

The children spent the nights at friends' houses. The Husband spent time that weekend with the other woman. When the Wife returned, the parties argued about their marriage.

In September 1987, the parties went to joint counseling with Alfred Malone. In one of their sessions, the Husband stated that he wanted to live two or three nights a week with the other woman and the rest of the time with the Wife. This arrangement was not acceptable to the Wife.

In October 1987, the Husband moved to Waquoit with the other woman.

In December 1987, the Husband forcibly attempted to move back into the marital home with the Wife. She first refused to take him back. The Husband lived at the Wife's mother's home in Falmouth for one week, then the parties resumed living together. They continued to see Mr. Malone for marriage counseling.

In June 1988, the Husband went sailing without the Wife. She became alarmed when the hour became late and he did not return. She drove to the harbor, waiting for his boat to return. She saw the Husband and the other woman coming ashore from the boat. The parties separated shortly thereafter.

The Husband's affair and the parties' separation has affected the Wife as follows: She has been under great stress and strain; she continued to receive counseling from Mr. Malone by herself; she agreed to joint counseling with the Husband's counsellor and continued to see that counsellor by herself when the Husband stopped attending; she has been unhappy about the end of the parties' long marriage; she has suffered during the pendency of this action throughout the painful negotiations and lengthy trial.

The Wife became concerned about the Husband's borrowing money for land development since she learned of his involvement with another woman.

Her further concern arose when the Husband, during the litigation and during the trial of this case, proceeded to seek enforcement of an Option Agreement which was signed by the

Wife on December 30, 1981 for the express purpose of avoiding capital gains tax liability that would result to the Husband and Wife upon their sale of their marital home in Wayland, Massachusetts. The parties had sold their marital home on Decatur Lane, Wayland, Massachusetts, for $195,000.00. The property was in the Wife's name solely. A capital gain resulted from the sale. In order to defer the gain, the parties had to reinvest the proceeds from the sale of Decatur Lane into another home, the purchase price of which had to be at least the amount of the sale price of Decatur Lane and the title to which had to vest in the Wife. This had to occur before December 31, 1981.

The Husband conveyed the Falmouth, Massachusetts, home which had been in his name to a trust called the Woodcock Trust and then transferred his beneficial interest in the Trust to his Wife. She had to "purchase" his interest with "her" proceeds from the Wayland home sale in order for the tax avoidance plan to work. The parties used the $195,000.00 proceeds from the Decatur Lane sale to renovate and improve the Falmouth beach house and the Wife was to give a note to create an apparent sale price of $200,000.00.

The Husband's tax attorney, Chester Howe, testified at trial that none of the work done for the parties, including the note and the option agreement, would have been done if there had been no gain realized on the sale of the Decatur Lane house. From the Husband's own witness the Court learned that these transactions were done simply to defer the sizeable gain realized and not to limit the Wife's right to equitable property division.

The evidence was clear that the Wife signed the documents at her Husband's request for the sole purpose of deferring the gain realized, and not as a waiver of her marital rights. Moreover, she received no consideration from the Husband for such a limitation on her rights as he now asserts was the purpose of the option agreement. Conveyance of the marital home to the Husband some ten years earlier and this transfer

and retaining of all the assets by the Husband after a 19 year marriage was not fair and reasonable and is in fact unconscionable.

The Court finds that the Wife did not agree to limit her right to an equitable division of the marital home when she signed the note and the option agreement. In fact, the Husband's use of this tax avoidance plan was a sham.

Under the terms of the option agreement, together with the note and its uncollected interest for the past eight and one-half years, the Wife's interest in the $1.2 million property in Falmouth is limited to less than $45,000.00, roughly three and three quarters percent of its fair market value. An agreement that seeks to limit a spouse's interest in this way is unconscionable and is nullified by this Court as equity and justice requires.

It is well settled that agreements between husbands and wives are subject to strict scrutiny by the Court. Courts must find agreements to be fair and reasonable before they can be incorporated into a judgment.

It appears that the same attorneys who represented the Wife in the sale of the Decatur Lane, Wayland, house were only representing her Husband in December, 1981, for neither George Dallas or Chester Howe of Gaston, Snow explained to the Wife the far reaching implications of signing that agreement. She had no independent legal advice. She was not counseled to obtain independent legal advice. She was not counseled that her former attorneys were now acting in a capacity that was adverse to her best interests.

It is clear that never, since 1981 has the Husband sought to claim interest on the note he had his Wife sign. He testified in this trial that he never requested that his Wife pay any interest to him. The option agreement that the Husband seeks to enforce would leave from the One Million One Hundred Ten Thousand Three Hundred Eighty-six ($1,110,386.00) Dollar net value of the marital home at Spinnaker Lane, Falmouth, Massachusetts, only Forty-five Thousand

($45,000.00) Dollars for the Wife after this twenty-six year marriage in which she had made outstanding contributions to its success through the years. To leave the Husband with over one million dollars from the marital home alone is unconscionable and flies in the face of the tenets of G.L. Ch. 208, sec. 34.

Mr. Howe testified that he met with the parties regarding the capital gains tax avoidance. He could not testify with certainty about the meetings or when they reportedly took place.

The Wife testified that she had a couple of meetings with Mr. Howe in the mid-1960's when he prepared the parties' estate plan. The next time she met face to face with Mr. Howe was in 1987 to discuss the change in the tax law regarding the deductibility of interest. This meeting took place in his office. She did not meet with Mr. Howe in December, 1981. The Court finds the Wife's testimony credible in this regard.

In December 1981, Mr. Howe asked an associate, Kevin Smith, to prepare the documents to effectuate the capital gains tax avoidance plan he recommended to the Husband. Mr. Howe testified that he had no conversations with the Wife about the documents, including the option agreement.

Mr. Howe testified that none of the work done for the parties in December 1981 would have been done if there had been no gain realized on the sale of Decatur Lane.

Mr. Howe testified that the promissory note was needed to get the purchase price of the marital home to $200,000.00 and thereby effectuate the capital gains tax avoidance plan.

The Husband has never demanded any interest from the Wife in connection with the promissory note. He testified that he intends to collect interest on the note, but that he never told her that he would collect interest on it.

The interest and the total amount due on the promissory note, if the note were bona fide and not part of a device to avoid paying the gain realized on Decatur Lane, are as follows:

YEAR	INTEREST	TOTAL DUE
1982	$ 6,815.57	$ 74,971.27
1983	7,479.13	82,468.40
1984	8,246.84	90,715.24
1985	9,071.52	99,786.76
1986	9,978.48	109,765.44
1987	10,976.54	120,741.98
1988	12,074.20	132,816.18
1989	13,281.62	146,097.80

The Court finds that there is no credible evidence that the Wife executed the documents prepared by Gaston Snow for the purpose other than to defer the gain realized on Decatur Lane. The court finds that the Wife did not contract to limit her rights under Section 34 of Chapter 208 of the General Laws by executing such documents.

The Husband's total disregard of Court orders, his failure to provide accurate financial information during the preparation and trial of this case and his desire to leave the Wife with $45,000.00 from the value of the Spinnaker Lane marital home have all contributed to the Wife's substantial counsel fees.

The parties had agreed on an appraiser selected by the Husband to appraise their real estate and they further agreed that they would each pay one-half of the cost and the appraisal figures would be binding on both of them.

When new counsel entered the case and asked if a new appraisal could be done by the Husband, the Court clearly stated to all parties that there was a prior agreement between the parties re the appraisal done by Faye Hamre that was to be binding. The Court further stated that because of the current decline in real estate values, the Court would allow a second appraisal to indicate any lowering in value from the accepted figures of Faye Hamre's appraisal only. The Husband deliberately disregarded the Court's order, engaged a new appraiser who changed the original values agreed upon

by the parties and then went on to lower values from his first set of unauthorized changes.

OPPORTUNITY FOR FUTURE ACQUISITION OF CAPITAL ASSETS & INCOME

The Husband has the opportunity to acquire future assets. He has significant capital assets which he has acquired through his real estate developments, current investments and his substantial funds in unearned income. He has opportunities with his experience in banking to return to productive employment in the banking world and his large holdings in the Robert S. Hurd Trust and his interest in the Eleanor Studley Hurd Trust for life, that provides for discretionary pay-out of principal by the trustees of the trust, shall provide him with opportunities to expand his estate.

The Wife has no opportunity to acquire future capital assets. She works at a salaried position at Wheaton College. She can increase her pension by continuing work at the college. Her mother is a widow of modest means and the Wife is one of three children. By the Wife receiving an equitable share of the marital estate, she will then be in a position to acquire future assets such as purchasing a home and making prudent investments to increase her estate.

CONTRIBUTION TO ACQUISITION, PRESERVATION & APPRECIATION IN VALUE OF PARTIES' ESTATES

The parties were married for twenty-six years, had a good marriage, raised four children. Each contributed to the marriage through the years. The Wife contributed not only as a homemaker but helped the Husband to increase their financial estate by locating a property in Boxboro and this investment was financially beneficial to them and their family, by further preserving the family's assets, by working outside the home when the children were older and in school and contributing

$500.00 of her funds to the monthly mortgage on the 66 Spinnaker Lane, Falmouth, home, when the parties borrowed against the equity in the marital home in 1987 to pay for outstanding educational loans and car and boat loans of the Husband, providing all the clothing for herself and the children, her buying the weekly groceries in the amount of $125.00 per week, paid for the children's hockey and summer camps, and since the Husband was unemployed, provided the family's health insurance at a monthly cost to her of $283.00 per month. She bought a used car which her third son uses at college. She paid for all gasoline, oil and repairs on her own car. She contributed toward family vacations to Europe and Disney World, among many other contributions to her Husband and family.

The Wife was an active participant in the parties' investment venture in Boxboro. She, together with her Husband, looked at property for three to five months before deciding to purchase the undeveloped land in Boxboro for approximately $86,000.00. The property was later sold for $200,000.00. Of the proceeds, the Husband received $47,900; the Wife received $25,800. The parties received a note from the purchaser in the amount of $118,000. The children's 50 percent share of the proceeds was placed in trust for the benefit of the children. The Wife was the sole trustee. She later received $22,000 from the payments on the note.

The Wife has managed that trust since its inception without compensation. She has distributed the income therefrom to or for the benefit of the children, mostly for their education.

In 1984, from her own funds, the Wife "loaned" $10,000 to Rob and $10,000 to Jack, who were to use the income therefrom to pay for college expenses. Upon graduation, at her direction, Rob and Jack transferred $10,000 each to Sandy to use the income therefrom for his college expenses. When Sandy graduates, he is to transfer $20,000 to Peter to use the

income therefrom for his college expenses. Upon Peter's graduation, Peter must transfer $5,000 each to Rob, Jack and Sandy and keep $5,000 for himself.

In 1988, the Husband sought to borrow $1,000,000 to develop the property at Childs River Road. He had never developed real estate before. His plan for development consisted of a novel "boatel," combination condominium/motel with boat docks and storage for boat. He sought to pledge all of his securities and the marital home as collateral for this million dollar loan. At the time the Husband was romantically involved with another woman. The Wife knew of the affair and the break-up of the long marriage seemed likely.

When the Husband sought to pledge all of the marital assets, including the securities in his trust and the marital home as collateral, the Wife sought the advice of an attorney at Hutchins & Wheeler. As a result, she refused to give her consent to such a loan and a pledge of the marital assets.

In June 1988, the Husband contracted with Henry Stout, who became the general partner in the development of the property at Childs River Road, the Husband was a limited partner in the project. Mr. Stout had extensive experience in developing real estate and was able to obtain the financing for the project. As a result of the Wife's insistence that their assets not be pledged as collateral, the marital assets were preserved and none of their property was dissipated.

In 1987, after the Husband had become involved with the other woman, he sought to borrow against the equity in the marital home. The Wife agreed that, because of the change in the tax laws, loans the parties had incurred to pay for college expenses and the Husband's car and boat, should be paid with funds borrowed against the equity in their house to take advantage of the change in the tax laws. She wanted a straight mortgage, where regular payments of principal and interest would be required. The Husband wanted an equity line of credit that he could use at his discretion and not have to make regular payments of principal. The Wife's opposition to such

a line of credit further preserved the parties' equity in the marital home. The Wife was a true helpmate during this marriage of twenty-six years.

CONTRIBUTION OF EACH OF THE PARTIES AS A HOMEMAKER TO THE FAMILY UNIT

The Wife was primarily responsible for the care and maintenance of the home and children.

The Husband also contributed to the parenting of the children.

PRESENT & FUTURE NEEDS OF THE DEPENDENT CHILDREN

Alexander will need to continue to be supported while he completes his college education at Colgate. It is anticipated that he will have two more years of college study and expenses.

Peter will continue to need support until he is emancipated. He will have boarding school expenses for four years through secondary school. He will then have college expenses for another four years. Although he will be entering boarding school in the fall, he will still be making his primary home with his mother.

CONCLUSIONS OF LAW

The Court has jurisdiction over the parties and the subject matter.

An irretrievable breakdown of the marriage has existed from the period of the filing of the Complaint to the date of the hearing.

G. L. Ch. 208, sec. 1B

A party seeking a support order must first use his or her available means to meet his or her own expenses before requesting an order for support.

Anderson v. *Anderson*, 333 So. 2d (Fla. Dis. Ct. App. 1976)

A party cannot ignore a feasible source of income.

Pagar v. *Pagar*, 9 Mass. App. Ct. 1 (1980)

The Court has the power in its discretion to equitably divide the estate of the parties.

M. G. L. Ch. 208, sec. 34

Rice v. *Rice*, 372 Mass. 398 (1977)

Bianco v. *Bianco*, 371 Mass. 420 (1976)

It has also been established that in balancing factors, if contribution is to be considered under the statute, so then must failure to contribute be recognized.

Redding v. *Redding*, 398 Mass. 102 (1986)

Bacon v. *Bacon*, 26 Mass. App. Ct. 117, 118-119 (1988)

Evidence of outside contributions to one or both of the parties can be relevant to the determination of the nature and the extent of the "estate" of each party.

Tanner v. *Tanner*, 14 Mass. App. 922, 436 N.E. 2d 984 (1982)

In ordering an apportionment of marital assets, a court should consider and minimize adverse tax consequences.

Robbins v. *Robbins*, 16 Mass. App. Ct. 576, 453 N.E. 2d 1058 (1983)

Fechtor v. *Fechtor*, 534 N.E. 2d 1 (1989)

Faced with a battle of experts, the court may accept one reasonable opinion of value and reject the other. Or the court may reject expert opinion altogether and arrive at a valuation on other evidence.

Fechtor v. *Fechtor*, 26 Mass. App. Ct. 859, 863 (1989)

Where both parties select an expert whose opinions of value are to be binding on both parties, the opinions of such a person shall, absent a compelling reason to the contrary, be accorded full weight by the Court.

Massachusetts law vests in a judge broad powers of discretion regarding the division of marital assets.

Hanify v. *Hanify*, 403 Mass. 184, 187 (1988)

Gardner v. *Gardner*, 9 Mass. App. Ct. 899 (1980)

Langerman v. *Langerman*, 9 Mass. App. Ct. 869 (1980)

Under Mass. Gen. Laws, Ch. 208, sec. 34, a judge may assign to one party in a divorce proceeding all or part of the separate non-marital property of the other in addition to or in lieu of alimony.

Rice v. *Rice*, 372 Mass. 398, 401 (1977)

Bianco v. *Bianco*, 371 Mass. 420 (1976)

A party's estate includes all property to which he or she holds title, however acquired.

Rice v. *Rice*, 372 Mass. 198, 400 (1977)

Inheritances acquired during the marriage constitute assets subject to division under Mass. Gen. Laws, Ch. 208, sec. 34.

Davidson v. *Davidson*, 19 Mass. App. Ct. 364 (1985)

Earle v. *Earle*, 13 Mass. App. Ct. 1062 (1982)

Agreements between husbands and wives are subject to strict scrutiny by the court.

Dominick v. *Dominick*, 18 Mass. App. Ct. 85 (1984)

Osborne v. *Osborne*, 384 Mass. 591 (1979)

Carver v. *Waldman*, 21 Mass. App. Ct. 959 (1986)

To be valid and enforceable, agreements between husbands and wives must be fair and reasonable.

Knox v. *Remick*, 371 Mass. 433, 436-437 (1976)

Brash v. *Brash*, 407 Mass. 101 (1990)

Even if it were held to be an agreement, the option agreement which limits the Plaintiff's interest in the marital home valued at $1,200,000 and located at 66 Spinnaker Lane, Falmouth, to less than $45,000 is unconscionable.

Brash v. *Brash*, 407 Mass. 101 (1990)

Even if it were held to be an agreement, the option agreement which limits the Plaintiff's interest in the marital home

valued at $1,200,000 and located at 66 Spinnaker Lane, Falmouth to less than $45,000 is not fair and reasonable.

Brash v. *Brash*, 407 Mass. 101 (1990)

The Defendant and his attorneys' failure to disclose the alleged effect of the promissory note and option agreement on the Plaintiff's rights under Mass. Gen. Laws, Ch. 208, sec. 34, constitutes a breach of duty to the Plaintiff and a misrepresentation.

Lavin v. *Lavin*, 24 Mass. App. Ct. 929 (1987)

The Defendant and his attorneys' failure to disclose the alleged effect of the promissory note and option agreement on the Plaintiff's rights under Mass. Gen. Laws, Ch. 208, sec. 34, raises a clear inference of overreaching where the Plaintiff was not advised to seek independent counsel.

Pennise v. *Pennise*, 466 N.Y.S. 2d 631 (1983)

An order for equitable division should be based on a comprehensive analysis of all major elements of contribution by the spouses during the marriage.

Putnam v. *Putnam*, 5 Mass. App. Ct. 10, 17 (1977)

Before the Court exercises its discretion to assign estate assets, it must consider all the applicable criteria of the statute: length of marriage; conduct of the parties; age; health; station; occupation; amount and sources of income; vocational skills; employability; estate, liabilities; needs; the opportunity for future acquisition of capital assets; and the present and future needs of the dependent children of the marriage.

Mass. Gen. Laws, Ch. 208, sec. 34

Bowring v. *Reid*, 399 Mass. 265 (1987)

Rice v. *Rice*, 371 Mass. 398

The Court may also consider the contributions of each in the acquisition, preservation or appreciation in the value of their respective estates and the contribution of each as a homemaker.

Mass. Gen. Laws, Ch. 208, sec. 34

The Court may properly make an award for support commensurate with the previous standard of living, the needs and the abilities of the parties to earn income.

Mancuso v. *Mancuso*, 12 Mass. App. Ct. 973 (1981)

The weight to be accorded each of the Mass. Gen. Laws, Ch. 208, sec. 34, factors in a particular case is in the judge's discretion.

Langerman v. *Langerman*, Mass. App. Ct. 495 (1980)
Ross v. *Ross*, 385 Mass. 30, 37 (1982)

Stipulations made in open court by the parties or their attorneys and acted upon by the Court have been held to be binding on the parties.

Savage v. *Blanchard*, 148 Mass. 348, 349 (1989)

The concept of property assignment or equitable division under Mass. Gen. Laws, Ch. 208, sec. 34, must be read to apply in a broad sense to the value of all contributions of the respective spouses toward the marital enterprise; it contemplates something more than determining which spouse's money purchased a particular asset.

Putnam v. *Putnam*, 5 Mass. App. Ct. 10 (1977)

When a party advances a specious theory such as using the tax avoidance documents to limit a spouse's rights under sec. 34 of ch. 208, there is an additional basis for the award of counsel fees.

The Court may, in its discretion, award costs and expenses to a party.

Mass. Gen. Laws, Ch. 208, sec. 38
Kennedy v. *Kennedy*, 20 Mass. App. Ct. 559, 564-565 (1985)
Robbins v. *Robbins*, 19 Mass. App. Ct. 538, 542 (1985)
Hayden v. *Hayden*, 326, 587 (1950)

When a defendant has been adjudged in contempt as was the case with the Defendant by judgment dated November 16, 1989, and when the defendant later violates the same court order by again entering the house and by acquiring real

estate without notice, the court is required to award full reasonable costs and expenses, including attorney's fees.

Kennedy v. *Kennedy*, 223 Mass. App. Ct. 176 (1986) aff'd 400 Mass. 272 (1987)

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
91-P-721

ELIZABETH ANN HURD
v.
ROBERT S. HURD.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

This is an appeal by the husband from a judgment of divorce nisi. He claims among other things that the judge's findings supporting his ultimate conclusion are clearly erroneous. We affirm.

The husband contends that the judge erred in dividing property that the husband had inherited from his family. He urges that we treat inherited property differently from other marital property.

General Laws c. 208, § 34, states in relevant part that "[t]he court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

In regard to the inherited property, Massachusetts is not one of the jurisdictions which excludes from property distribution a spouse's assets received through bequest. See *Earle* v. *Earle*, 13 Mass. App. Ct. 1062, 1063 (1982) (wherein the court ruled that an argument that an inheritance belongs only to one spouse and cannot be divided "fails to come to grips with G. L. c. 208, § 34, which gives the probate judge broad discretion in accordance with the factors listed in that section, to assign

to one spouse the property of the other spouse whenever and however acquired"). Therefore, the judge could properly consider the property received by the husband through inheritance under G.L. c. 208, § 34. Here, it is apparent that the judge considered all the factors present in § 34, and based her decision as to property division on those factors.

The husband also attacks the judge's assessment of the credibility of testimony of the husband and wife. He claims that the wife's testimony should have been viewed by the judge as less credible than his. However, it is the trial judge's province "to judge the weight and credibility of the evidence." *New England Canteen Serv., Inc.* v. *Ashley*, 372 Mass. 671, 675 (1977)". "'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'". *Edinburg* v. *Edinburg*, 22 Mass. App. Ct. 199, 203 (1986) (citation omitted).

With regard to the argument by the husband that the judge's findings were erroneous, we have carefully reviewed the entire record and find no error. The findings have support in the evidence, and the "reasons for the judge's conclusions are apparent in [her] findings and rulings". *Dalessio* v. *Dalessio*, 409 Mass. 821, 830 (1991).

As a result of our decision, we need not address the wife's motion to dismiss the appeal. The wife's request for appellate fees and costs is denied.

Judgment affirmed.

By the Court (Smith, Jacobs & Ireland, JJ.),

Asst. Clerk

Entered: June 29, 1992.

APPENDIX E

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS
1412, COURTHOUSE, BOSTON, MASSACHUSETTS 02108
(617) 725-8055

Gerald D. McLellan, Esquire
McLellan and Zack
45 School Street
Boston, MA 02108

RE: Docket No. FAR-06266

ELIZABETH ANN HURD
v.
ROBERT S. HURD

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on October 1, 1992, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: October 2, 1992

To: Weld Henshaw, Esquire
Gerald D. McLellan, Esquire

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

92-1141

No. 92-

In the

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT S. HURD,
Petitioner,

v.

ELIZABETH ANN HURD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

JAMES C. HEIGHAM,*
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**Attorney of Record*

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Question Presented.

Respondent is not aware that this case presents any substantial federal question. The petition is filed by an individual unhappy with the final judgment in his Massachusetts divorce.

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CONSTITUTIONAL AND STATUTORY PROVISIONS.

Massachusetts General Laws

c. 208, § 34 *passim*

United States Constitution

Amendment Fourteen 3, 4, 7

No. 92-

In the
Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT S. HURD,
Petitioner,

v.

ELIZABETH ANN HURD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION.

Summary of the Argument.

This case involves issues solely of Massachusetts law; or, in the alternative, petitioner has suffered no due process vio-

lation from the application of G.L. c. 208, § 34, a remedial statute with a proper, rational legislative purpose.

Argument.

I. Petitioner Raises No Substantial Federal Question.

This case raises issues solely of Massachusetts law. Specifically, this is a divorce action focusing on the division of the marital estate between the spouses. Because such cases present no federal question, this Court has historically refused to hear them. "It has been understood that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States' . . . and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied." *Popovici* v. *Agler*, 280 U.S. 379, 383 (1930), *citing Ex parte Burns*, 136 U.S. 586, 593-594 (1890), *Barber* v. *Barber*, 21 How. 582 (1858), *Simms* v. *Simms*, 175 U.S. 162, 167 (1899), *De La Rama* v. *De La Rama*, 201 U.S. 303, 307 (1906). Domestic relations cases pose issues of "intensely local interest," *United States* v. *Yazell*, 382 U.S. 341, 349 (1966), requiring a familiarity and expertise with state laws and economic factors which only the state courts possess. *Rose* v. *Rose*, 481 U.S. 619 (1986).

While a federal court may override state interests and assume jurisdiction of a domestic relations case, it may do so only in the rare case "where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Yazell*, 358 U.S. at 352 (finding no federal interest in over-riding Texas law on coverture to permit Small Business Administration to collect on a contract). As the cases cited by petitioner indicate, federal courts have found

such a clear and substantial interest in divorce cases only when state and federal laws conflict over the allocation of a federal entitlement. *E.g.*, *Ridgeway* v. *Ridgeway*, 454 U.S. 46 (1981) (concerning an insured's designation as beneficiary under a policy issued pursuant to the Servicemen's Group Life Act); *Mansell* v. *Mansell*, 490 U.S. 581 (1989) (involving military retirement pay as property divisible upon divorce); and *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (concerning whether benefits received under The Railroad Retirement Act of 1974 were community property).

Failing to have any federal entitlement at issue, petitioner attempts to create a federal question by claiming a violation of his right to due process under the Fourteenth Amendment of the United States Constitution as a result of an allegedly "retroactive" application of Massachusetts General Laws Chapter 208, Section 34 ("G.L. c. 208, § 34"). However, no such constitutional issue arises here, since G.L. c. 208, § 34 acts purely in a prospective matter. The Massachusetts legislature amended G.L. c. 208, § 34 on July 19, 1974, to include, *inter alia*, inherited property as part of the marital estate which may be divided upon divorce. On July 19, 1974, petitioner was still married to respondent, and G.L. c. 208, § 34 did not effect him in any way. General Laws c. 208, § 34 did not divest petitioner of any money received from The Robert S. Hurd Trust (the "Trust"), a revocable trust established by petitioner as a vehicle to manage his personal investments. Neither did G.L. c. 208, § 34 transfer petitioner's income from or title to the Trust. Instead, petitioner continued to receive money from the Trust as he always had.

Petitioner would have continued to have been unaffected by G.L. c. 208, § 34 had he remained married. However, in 1988, *long after* G.L. c. 208, § 34's amendment, he became involved in a divorce proceeding, a triggering event which then caused G.L. c. 208, § 34 to apply. A "statute which is

contingent upon an act. . . committed not before but after the enactment of the statute" is not retroactive. *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (holding that a statute was prospective when it changed marketing quotas after appellant planted his crop, but before he harvested it, since the statutory penalty became incurred only upon threshing); *see also Fleming* v. *Rhodes*, 331 U.S. 100, 107 (1947) ("Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the constitution.")

Since G.L. c. 208, § 34 acts purely prospectively, petitioner has not been deprived retroactively of any right whatsoever, and no constitutional due process violation has occurred.

II. Even If This Court Were to Find That Petitioner Raises a Substantial Federal Question, G.L. c. 208, § 34 Does Not Deprive Petitioner of His Federal Due Process Rights.

A. *As a Statute Which Operates as a Remedial One for Individuals Married at its Enactment, G.L. c. 208, § 34 Cannot Fairly be Described as "Retroactive".*

Petitioner argues that because it was enacted after his inheritances (but before his divorce), G.L. c. 208, § 34 has been applied retroactively. This operation is not a "retroactivity" that violates petitioner's federal constitutional right to due process under the Fourteenth Amendment.[1] Petitioner mischarac-

[1] While respondent is not aware that this issue has yet been decided in the federal courts, several state courts have decided that equitable property division statutes pose no federal constitutional due process violation. *Valladares* v. *Valladares*, 80 A.D.2d 244, 438 N.Y.S.2d 810 (1981), *aff'd*, 55 N.Y.2d 388, 434 N.E.2d 1054, 449 N.Y.S.2d (1982), *modified sub nom.*, *Tucker* v. *Tucker*, 55 N.Y.2d 378, 434 N.E.2d 1050, 449 N.Y.S.2d 683 (1982); *Fournier* v. *Fournier*, 376 A.2d 100 (Me. 1977); *McCree* v. *McCree*, 464 A.2d 922 (D.C. 1982); *Booth* v. *Booth*, 7 Va. App. 22, 371 S.E.2d 569 (1988).

terizes his position as having been deprived of a property right without due process of law. General Laws c. 208, § 34, however, does not alter the substantive rights of petitioner or of anyone else, for it is solely applicable prospectively for individuals married at its enactment. *See Ross* v. *Ross*, 385 Mass. 30, 430 N.E.2d 815 (1982). Retroactive application of the statute would be a case where the parties were divorced prior to the statute's enactment. A modification in such a case based on the later adopted statute would violate the Massachusetts contribution. *Hay* v. *Cloutier*, 389 Mass. 248, 449 N.E.2d 361 (1983).

When a statute alters only a remedy or a procedure, no constitutional bar prevents it from applying to an act occurring after the statute's enactment. *Ross*, 430 N.E.2d 815; *Ettor* v. *Tacoma*, 228 U.S. 148, 155 (1913) ("Matters which belong to the remedy are subject to change and alteration, and even repeal, provided the legislation does not operate to impair a contract or deprive one of a vested property right."); *Brown* v. *General Services Administration*, 507 F. 2d 1300 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1975). Traditionally, state courts have issued orders dividing marriage property as one of the remedies available upon divorce. General Laws c. 208, § 34, before its amendment, permitted Massachusetts courts to distribute the marital estate between the spouses. Under current G.L. c. 208, § 34, Massachusetts courts continue this distribution, the only change, if any, being that the present statute merely modifies and expands the relief now available upon divorces occurring after its enactment. It creates no new obligations.

While petitioner argues he has been deprived of a property right in his revocable Trust, his argument really claims he has been deprived of a right to a particular remedy. Yet, no one, including petitioner, has a right to a particular remedy. *See Mahroom* v. *Hook*, 563 F.2d 1369, 1373 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978). The petitioner's use of the in-

come be received from his property continued unabated for sixteen years after the amendment of G.L. c. 208, § 34. In 1990, however, when petitioner received his divorce, the remedy for executing that divorce included a fair division of the marital estate, including his revocable Trust over which he controlled dominion. Now, sixteen years after the amendment of G.L. c. 208, § 34, petitioner cannot attempt to convert a remedy into a right and thereby exclude the Trust forever from the division of the marital estate.

B. *The Rational Purpose of Serving the Public's Welfare Justifies the Application of G.L. c. 208, § 34 to Parties Divorcing after its Enactment.*

Even if petitioner were correct in asserting that G.L. c. 208, § 34 deprives him of a property right, G.L. c. 208, § 34 still commits no violation of his constitutional right to due process. "Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1975) (citations omitted). One complaining of a due process violation has the burden of proving that the legislature has acted arbitrarily and irrationally. *Id.* at 15. A rational legislative purpose justifies the application of a statute to parties divorcing after its enactment. *See Pension Benefit Guaranty Corp.* v. *R.A. Gray Co.*, 467 U.S. 717 (1984), *cert. denied*, 467 U.S. 1259 (1984).

Massachusetts has acted rationally by protecting its citizens. General Laws c. 208, § 34 serves the general public by preventing divorced individuals from becoming public charges; by recognizing the importance of parties' economic and non-economic contributions to the marital enterprise; and by treating marriage as a type of partnership. This goal of serving the public's general welfare constitutes a rational legislative purpose.

Further proof of the rational legislative purpose of G.L. c. 208, § 34 lies in an examination of the property division scheme which petitioner advocates. Petitioner's argument, if accepted, would result in an inherently unfair, inconsistent, complex property division mechanism in Massachusetts divorces. Petitioner would require Massachusetts courts to treat divorce cases filed on the same date differently from one other, all depending upon when and how property was derived, or alleged to be derived, through inheritance. Further, petitioner's argument would dictate that a court deciding a single divorce case examine each piece of inherited property individually to determine when it was received, with inheritances received before the enactment treated differently from those received before the enactment. This scheme of administrative chaos and unfairness would linger on for generations before it could be executed with any degree of uniformity. Such a result is impossible and unfair under the circumstances.

Conclusion.

This court should deny this petition, as it presents no substantial federal question and as petitioner has suffered no violation of his right to due process under the Fourteenth Amendment of the Constitution.

Respectfully submitted,

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Addendum.

Massachusetts General Laws.

208:34. Alimony; assignment of estate; rights and funds accrued during marriage; determination of amount of alimony or value of property; health insurance.

[Text as amended by 1990, 467 effective March 29, 1991. For text effective until March 29, 1991, see above.]

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reason-

able cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.